

**WAUKESHA COUNTY BOARD OF ADJUSTMENT
SUMMARY OF MEETING**

The following is a Summary of the Board of Adjustment Meeting held on Wednesday, August 27, 2008, at 6:30 p.m. in Room AC 255/259 of the Waukesha County Administration Center, 515 W. Moreland Blvd., Waukesha County, Wisconsin, 53188.

BOARD MEMBERS PRESENT: James Ward, Chairman
Robert Bartholomew
Ray Dwyer
Tom Day
Walter Schmidt

BOARD MEMBERS ABSENT: None

SECRETARY TO THE BOARD: Sheri Mount

OTHERS PRESENT: Town of Merton Board of Adjustment
Jim Gibson, BA08:051, agent
Don Dysland, BA08:046, owner
Robert Wellenbach, BA08:046, attorney
Charles Stelter, BA08:048, owner
Ron Borowski, BA08:047, owner
Brandon O'Bryan, BA08:047, attorney
Louis & Lisa Danegelis, BA08:051, owners
Bob Sokolowicz, BA08:046, neighbor
Don & Ginny Higgins, BA08:048, neighbor
Joe Renner, BA08:045, neighbor
Ann Hasselkus, BA08:045, landscape architect
Steve Fox, BA08:045, attorney
Jim & Sue Grinney, BA08:045, neighbors
Jack Bode, BA08:045, attorney for Grinneys
Fred Storm, BA08:045, owner
Jim Renner, BA08:045, neighbor

The following is a record of the motions and decisions made by the Board of Adjustment. Detailed minutes of these proceedings are not produced, however, a taped record of the meeting is kept on file in the office of the Waukesha County Department of Parks and Land Use and a taped copy is available, at cost, upon request.

SUMMARIES OF PREVIOUS MEETINGS:

Mr. Dwyer *I make a motion to approve the Summary of the Meeting of August 13, 2008.*

The motion was seconded by Mr. Bartholomew and carried 4-0. Mr. Schmidt abstained as he was not present at the August 13, 2008 meeting.

NEW BUSINESS:**BA08:046 DONALD AND SUSANNE DYSLAND:**

Mr. Schmidt

*I make a motion to **deny** the request, in accordance with the Staff's recommendation, as stated in the Staff Report and for the reasons stated in the Staff Report.*

The motion was seconded by Mr. Dwyer and carried unanimously.

The Planning and Zoning Division staff's recommendation was for **denial** of the requested after-the-fact variances from the shore setback, floodplain setback, and offset requirements for the deck, the covered porch/deck and hot tub and **denial** of the requested after-the-fact variances from the offset and remodeling a non-conforming structure in excess of 50% of its fair market value requirements for the deck constructed on the accessory building and the work to the accessory building that converted it to a second living unit.

The reasons for the recommendation, as stated in the Staff Report, are as follows:

DECK/COVERED PORCH/HOT TUB: It has not been demonstrated, as required for a variance, that denial of the requested after-the-fact variances would result in an unnecessary hardship. A hardship has been defined by the Wisconsin Supreme Court as a situation where compliance with the strict letter of the restrictions governing area, setbacks, frontage, height, bulk or density would unreasonably prevent the owner from using the property for a permitted purpose or would render conformity with such restrictions unnecessarily burdensome. It is not necessary to have a deck, covered porch in its current configuration and a hot tub to have reasonable use of the property. Variances should only be granted to accommodate physical limitations on a property that prevent a reasonable use of the property; not to accommodate the personal preferences or needs of the current property owner. Accessory structures such as decks, hot tubs, patios, etc., are amenities to a property, but are not necessary for reasonable residential use of any property. Case law has repeatedly held that petitioners are not entitled to the "highest and best use" of a property, but only reasonable use. The owner already had a reasonable use of this property and also has the opportunity to construct a deck and hot tub in a conforming location without the granting of any variances. Further, allowing the deck to remain within the offset area has a negative impact on the adjacent property owner. In addition, the Ordinance is intended (among other things) to preserve shore cover and natural beauty by preventing shoreline encroachment by structures. Approval of this request to allow the proliferation of illegal structures within the shore setback area has a negative impact on the lake, encourages people to undertake construction without permits, and would directly conflict with the purpose and intent of the Ordinance. The request does not meet any of the legal standards for the granting of a variance and therefore, the approval of this request would not be in conformance with the purpose and intent of the Ordinance. Please note that this means the covered deck and hot tub must be removed and or reconstructed in a conforming location. Any hardship this places on the property owner is self-created.

ACCESSORY BUILDING/COTTAGE: It has not been demonstrated, as required for a variance, that denial of the requested after-the-fact variances for the accessory building would result in an unnecessary hardship. A hardship has been defined by the Wisconsin Supreme Court as a situation where compliance with the strict letter of the restrictions governing area, setbacks, frontage, height, bulk or density would unreasonably prevent the owner from using the property for a permitted purpose or would render conformity with such restrictions unnecessarily burdensome. Most importantly, only one residence is allowed per lot in this zoning district; allowing a newly created additional living unit is considered a use variance. This building was utilized for storage prior to the recent conversion. The fact that the owner has been required to hook the building up to sewer by the Town is due to his conversion of this building into a separate living unit. Per Section 38(c)(4), the Board may not take action that has the effect of permitting a use which is otherwise prohibited in the zoning district or allowing a variance which would have the effect of rezoning a property or intensifying a use in a manner contrary to what other properties in the zoning district would be allowed. The Waukesha County Zoning and Planning staff feels that allowing this second living unit to remain, even if it is called a “guesthouse”, is a use variance and cannot be granted by the Board. Further, it is not necessary to have a second living unit on a single family residentially zoned property to have a reasonable permitted use of the property. Furthermore, the building was extremely non-conforming even before the conversion/remodel took place. The whole purpose of the 50% provision is to limit the life of non-conforming structures that were constructed prior to the passage of the Ordinance. It is also important to note that there is still almost 2,200 sq. ft. of living and storage space on this property without the second living unit (not including the basement of the main residence) with the opportunity to add almost 1,000 sq. ft. more as long as it is done in a conforming and legal manner. This is much more than many lake properties can have and it certainly provides a reasonable use of any property. Case law has repeatedly held that petitioners are not entitled to the “highest and best use” of a property, but only reasonable use. More importantly, allowing an illegally constructed second living unit to remain on this property increases the intensity of land use. This does have a negative impact on the lake and the general public interest and welfare. The ordinance was established to promote the public health, safety, convenience and welfare, prevent and control water pollution, protect spawning grounds, fish and aquatic life by controlling building sites, placement of structures and land uses through prohibiting uses detrimental to the shoreland area, regulating building and structural placement, and by regulating land and water uses so as to assure a more compatible relationship to the carrying capacity of the land and water. The request does not meet any of the legal standards for the granting of a variance and therefore, the approval of this request would not be in conformance with the stated purpose and intent of the Ordinance. Please note that a denial means the building must be removed. Again, any hardship this places on the property owner is self created. The owner would have been able to legally maintain this building in its prior use as an accessory storage building, but now that it has been illegally improved beyond 50% of its value, it must be removed from the property.

BA08:047 RON BOROWSKI:

Mr. Dwyer

*I make a motion to **deny** the request, in accordance with the Staff's recommendation, as stated in the Staff Report and for the reasons stated in the Staff Report.*

The motion was seconded by Mr. Day and carried unanimously.

The Planning and Zoning Division staff's recommendation was for **denial** of the requested variances from the road setback, shore setback, and floodplain setback requirements and **denial** of the requested special exception from the offset requirements of the Waukesha County Shoreland and Floodland Protection Ordinance.

The reasons for the recommendation, as stated in the Staff Report, are as follows:

It has not been demonstrated, as required for a variance, that denial of the requested variances would result in an unnecessary hardship. A hardship has been defined by the Wisconsin Supreme Court as a situation where compliance with the strict letter of the restrictions governing area, setbacks, frontage, height, bulk or density would unreasonably prevent the owner from using the property for a permitted purpose or would render conformity with such restrictions unnecessarily burdensome. The proposed addition is not necessary for reasonable use of the property. First, the owner states that the current structure was originally built in a conforming location and has only recently become non-conforming. This is not true as the Shoreland and Floodland Protection Ordinance has been in effect since 1970. Based on aerial photographs, the main residence appears to have been built sometime between 1963 and 1970. The cottage appears to have been built long before that. Therefore, at the time the Ordinance was passed in 1970, both became legally non-conforming structures and have never complied with the provisions of the Ordinance. Please note that the main residence is non-conforming to offset, shore setback, floodplain setback, and also due to the fact that there are two living units on this single family residential property. In addition, the fact that this structure was built before the passage of the Ordinance is not at all unique to this property and therefore does not constitute a unique property feature. The owner also states that a larger bedroom is necessary for this structure to be used as a primary residence. However, by the owner's own admission, this structure has been utilized as a single family residence for well over 40 years and the owner himself has lived there for several years. Therefore, the addition is clearly not necessary for this structure to be utilized as a primary residence. Furthermore, there is currently 2,650 sq. ft. of living and storage space on this property and two living units. If the property owner now desires additional living space for himself, there are options available beyond constructing an addition to a second living unit that requires multiple variances. Both existing structures can be removed and a new, much larger single family residence could be constructed on this property in a completely conforming location. Alternatively, an addition could be constructed on the road side of the main residence in a conforming location as long as its construction would not exceed 50% of the value of the structure (while also taking into account previous remodeling). The requested addition also requires a special exception. A special exception differs from a variance in that a special exception does not necessarily require the

demonstration of an unnecessary hardship. However, when granting special exceptions, the Board of Adjustment must still consider whether the proposed special exception would be hazardous, harmful, noxious, offensive or a nuisance to the surrounding neighborhood by reason of physical, social or economic effects and the Board may impose such restrictions or conditions they deem necessary for the protection of adjacent properties and the public interest and welfare. Allowing a structure that is only 2 ft. from a lot line to be expanded has a negative impact on the adjacent landowner. The minimum offsets are in place to protect and buffer adjacent landowners from one another. Finally, allowing additions to a building within the shore setback area goes against the purpose and intent of the Ordinance since there is a conforming location in which to build on this property, i.e. denial of the requested variances does not deny the owner reasonable use of this property. Variances should only be granted to accommodate physical limitations on a property that prevent a reasonable use of the property; not to accommodate the personal preferences or needs of the current property owner. Case law has repeatedly held that petitioners are not entitled to the “highest and best use” of a property, but only reasonable use. The owner already has a reasonable use of this property and also has the opportunity to add living area to this property without the need for variances. The request does not meet any of the legal standards for the granting of a variance and therefore, the approval of this request would not be in conformance with the purpose and intent of the Ordinance.

BA08:048 CHARLES STELTER:

Mr. Schmidt

*I make a motion to **deny** the request, in accordance with the Staff's recommendation, as stated in the Staff Report and for the reasons stated in the Staff Report.*

The motion was seconded by Mr. Bartholomew and carried unanimously.

The Planning and Zoning Division staff's recommendation was for **denial** of the requested after-the-fact variance from the offset requirements for the deck/covered deck and hot tub and **denial** of the requested after-the-fact variances from the offset, shore setback and floodplain setback and **denial** of the requested after-the-fact special exceptions from the accessory building floor area ratio for the shed.

The reasons for the recommendation, as stated in the Staff Report, are as follows:

DECK/HOT TUB: It has not been demonstrated, as required for a variance, that denial of the requested variance would result in an unnecessary hardship. A hardship has been defined by the Wisconsin Supreme Court as a situation where compliance with the strict letter of the restrictions governing area, setbacks, frontage, height, bulk or density would unreasonably prevent the owner from using the property for a permitted purpose or would render conformity with such restrictions unnecessarily burdensome. It is not necessary to have a deck in its current configuration and a hot tub to have reasonable use of the property. Variances should only be granted to accommodate physical limitations on a property that prevent a reasonable use of the property; not to accommodate the personal preferences or

needs of the current property owner. Accessory structures such as decks, hot tubs, patios, etc., are amenities to a property, but are not necessary for reasonable residential use of any property. Case law has repeatedly held that petitioners are not entitled to the “highest and best use” of a property, but only reasonable use. The owner already had a reasonable use of this property and also has the opportunity to construct a deck and hot tub in a conforming location without the granting of any variances. Furthermore, the pre-existing deck was completely conforming and the enlargement of the deck and placement of the hot tub is not necessary to provide reasonable use of the property. Further, allowing the deck to remain within the offset area has a negative impact on the adjacent property owner. The request does not meet any of the legal standards for the granting of a variance and therefore, the approval of this request would not be in conformance with the purpose and intent of the Ordinance.

SHED: It has not been demonstrated, as required for a variance, that denial of the requested variances form offset, shore setback, and floodplain setback for a third accessory building on this property would result in an unnecessary hardship. A hardship has been defined by the Wisconsin Supreme Court as a situation where compliance with the strict letter of the restrictions governing area, setbacks, frontage, height, bulk or density would unreasonably prevent the owner from using the property for a permitted purpose or would render conformity with such restrictions unnecessarily burdensome. It is not necessary to have a third accessory building located 1 ft. from a lot line, 16 ft. from the shoreline and 11 ft. from the floodplain to have a reasonable single family residential use of this property. First, this property has 2,080 sq. ft. of living and storage space without this shed, which is much more than most lake property owners enjoy; i.e. the owner already has a reasonable use of this property. Furthermore, again, accessory structures such as sheds, decks, patios, etc., are amenities to a property, but are not necessary for reasonable residential use of any property. Case law has repeatedly held that petitioners are not entitled to the “highest and best use” of a property, but only reasonable use. The shed also requires special exceptions. A special exception differs from a variance in that a special exception does not necessarily require the demonstration of an unnecessary hardship. However, when granting special exceptions, the Board of Adjustment must still consider whether the proposed special exception would be hazardous, harmful, noxious, offensive or a nuisance to the surrounding neighborhood by reason of physical, social or economic effects and the Board may impose such restrictions or conditions they deem necessary for the protection of adjacent properties and the public interest and welfare. Allowing an illegally constructed shed to remain this close to the shore and floodplain does have a negative impact on the lake. The Ordinance was established for the purpose of promoting the public health, safety, convenience and welfare, to prevent and control water pollution, to protect spawning grounds, fish and aquatic life, to control building sites, and placement of structures and land uses through prohibiting uses detrimental to the shoreland area, regulating building and structural placement, regulating land and water uses so as to assure a more compatible relationship to the carrying capacity of the land and water. The Ordinance is also intended to preserve shore cover and natural beauty by preventing shoreline encroachment by structures. Approval of this request would directly conflict with the stated purpose and intent of the Ordinance. The request does not meet any of the legal standards for the granting of a variance and therefore, the approval of this request would not be in conformance with the purpose and intent of the Ordinance. Please note that a denial

means the shed must be removed from the property. Any hardship this places on the property owner is self created.

BA08:051 LOUIS AND LISA DANEGELIS (OWNERS) JIM GIBSON (AGENT):

Mr. Day

*I make a motion to **approve** the request, in accordance with the Staff's recommendation, as stated in the Staff Report and for the reasons stated in the Staff Report.*

The motion was seconded by Mr. Dwyer and carried unanimously.

The Planning and Zoning Division staff's recommendation was for Based on the above information, the Planning and Zoning Division staff recommends **approval** of the request for a variance from the remodeling a non-conforming structure in excess of 50% of its fair market value requirements of the Waukesha County Zoning Code, with the following conditions:

1. The proposed addition must conform to all locational and area requirements.
2. Prior to the issuance of a Zoning Permit, a detailed time and materials cost estimate of the project must be submitted to Planning and Zoning Division staff.
3. Prior to the issuance of a Zoning Permit, the Environmental Health Division must certify that the existing septic system is adequate for the revised construction, or a Sanitary Permit for a new waste disposal system must be issued and a copy furnished to the Planning and Zoning Division staff.
4. Prior to the issuance of a Zoning Permit, an updated Plat of Survey showing all existing structures and the staked-out location of the addition in conformance with all conditions, must be prepared by a registered land surveyor and submitted to the Planning and Zoning Division Staff for review and approval.
5. Prior to the issuance of a Zoning Permit, the final construction plans for the addition, in conformance with all conditions, must be submitted to Planning and Zoning Staff for review and approval.

The reasons for the recommendation, as stated in the Staff Report, are as follows:

The approval of this request, with the recommended conditions, will allow a reasonable use of the property that is not unnecessarily burdensome. It has been demonstrated, as required for a variance, that denial of the requested variances would result in an unnecessary hardship.

The residence is only slightly non-conforming and due to topographical constraints, is built on the most logical portion of the property. Given this, it would be unreasonable not to allow improvements to this structure. The 50% variance, as recommended, will not have an adverse impact on any adjacent property or to the public in general because the addition will

conform to all locational and area requirements. As recommended, the proposal provides a reasonable use of the property that is not unnecessarily burdensome and will permit remodeling and additions to the residence that are not detrimental to the surrounding neighborhood or contrary to the public interest. Therefore, the approval of this request, with the recommended conditions, is in conformance with the purpose and intent of the Ordinance.

BA08:045 FRED AND PATRICIA STORM (OWNERS) STEPHEN FOX (AGENT):

Mr. Day *I make a motion to deny the request, in accordance with the Staff's recommendation, as stated in the Staff Report and for the reasons stated in the Staff Report.*

The motion was seconded by Mr. Dwyer and failed to carry with a 2-2 vote. Mr. Schmidt recused himself from the hearing and the decision on this matter due to a potential conflict of interest.

Mr. Bartholomew *I make a motion to approve the request for an after-the-fact variance from the floor area ratio requirements with the following conditions:*

- 1. The two stalls on the detached garage must be removed as was proposed by and agreed to by the property owner at the time his Zoning Permit was issued for the attached garage.*
- 2. The nonconforming screen porch that was constructed without permits may remain; however, it shall not ever have a covering any more permanent, secure or rigid than the existing canvas top.*
- 3. The screen porch may not be rebuilt in the future.*
- 4. A detailed Grading and Drainage Plan, showing existing and proposed grades and any proposed retaining walls, berms, rain gardens, etc. must be prepared by a registered landscape architect, surveyor, or engineer and submitted to the Planning and Zoning Division staff for review and approval, prior to undertaking any additional activities on the property. This is to ensure that the removal of the detached garage and the previous construction of the attached garage do not result in adverse drainage onto adjacent properties. The intent is that the property be graded according to the approved plan, and also to provide that the drainage remain on the property or drain to the lake, and not to the neighboring properties or the road.*

The reasons given for the decision are as follows: The partial approval of this request allows the owner a reasonable use of the property that is not unnecessarily burdensome. The petitioner indicated that the owners need the entire detached garage for storage purposes. However, in addition to the detached garage, there is a boathouse on the property and the building plans for the

attached garage addition show that one of the garage stalls was to be used for boat storage with two additional parking stalls. The attached garage addition also has an upper level for additional storage space. It should further be noted that the owner has an interest in an approximately five acre parcel across Lakewood Drive from his property which is used by the subdivision owners for boat storage. Even without all or a portion of the detached garage, the owners still have ample storage area for lake living. The property owner may have many boats and/or vehicles that he would like onsite storage for; however, this is not a physical limitation of the property but a personal circumstance or desire of the property owner and is not justification for allowing the entire detached garage to remain. It was the owner's proposal to remove the two stalls of the detached garage in exchange for a Zoning Permit to construct a large attached garage. The owner built the attached garage and must comply with his agreement to remove a portion of the detached garage. The petitioner has indicated that the removal of the portion of the detached garage will cause a drainage problem. Based on evidence discussed at the hearing, it seems there is an existing drainage problem on the property. The removal of some impervious surface may help to alleviate some of that problem. Furthermore, alternative stormwater management practices may be implemented to further alleviate the drainage problem. The petitioner should be aware that the Zoning Permit for the attached garage addition was conditioned upon the construction not causing adverse drainage on neighboring properties. This drainage problem will need to be addressed and any alteration of drainage patterns caused by the removal of the garage may be addressed at the same time.

The motion was seconded by Mr. Ward and carried unanimously.

The Planning and Zoning Division staff's recommendation was for **denial** of the request for an after-the-fact variance from the floor area ratio requirements of the Ordinance.

The reasons for the recommendation, as stated in the Staff Report, are as follows:

The property would be allowed 4,259.7 sq. ft. of floor area without the need for a variance. Therefore, the property can be used for a permitted purpose without the need for the requested variance. As stated above, the Planning and Zoning Division staff does not feel that the right-of-way should be included in the owner's total lot size; however, even if this area were included, a variance from the floor area ratio requirements would still be required for the existing structures on the property.

In order to bring the property into compliance with the floor area ratio requirements of the Ordinance, the owner may remove the detached garage in its entirety or remove the screen porch and a portion of the detached garage. The owner was well aware of the floor area ratio requirements of the Ordinance prior to the construction of the addition and yet failed to disclose the existence of the screen porch, failed to remove the portion of the detached garage as was proposed, and increased the size of the attached garage without a revised permit. Therefore, any claim of hardship in this situation is self-created.

The petitioner has indicated that the removal of the portion of the detached garage will cause a drainage problem. Based on the plan created by Summit Land Planning, see attached Exhibit "C", and the site inspection of the property, as well as neighbor complaints, it appears that there may be an existing drainage problem on the property. The removal of some impervious surface may help to

alleviate some of that problem. Furthermore, alternative stormwater management practices may be implemented to further alleviate the drainage problem. The petitioner should be aware that the Zoning Permit for the attached garage addition was conditioned upon the construction not causing adverse drainage on neighboring properties. This drainage problem will need to be addressed and any alteration of drainage patterns caused by the removal of the garage may be addressed at the same time.

The petitioner further indicates that the owners need the entire detached garage for storage purposes. However, in addition to the detached garage, there is a boathouse on the property and the building plans for the attached garage addition show that one of the garage stalls was to be used for boat storage with two additional parking stalls. The attached garage addition also has an upper level for additional storage space. It should further be noted that the petitioner has an interest in an approximately five acre parcel across Lakewood Drive from his property which is used by the subdivision owners for boat storage. The Planning and Zoning Division staff feels that without all or a portion of the detached garage, the petitioners will still have ample storage area for lake living and that compliance with the Ordinance requirements will not be unnecessarily burdensome. There are no unique physical characteristics of this property which prevent compliance with Ordinance requirements. The property owner may have many boats and/or vehicles that he would like onsite storage for; however, this is not a physical limitation of the property but a personal circumstance or desire of the property owner and is not justification for the granting of a variance.

Therefore, it has not been demonstrated, as required for a variance, that denial of the requested variances would result in an unnecessary hardship. A hardship has been defined by the Wisconsin Supreme Court as a situation where compliance with the strict letter of the restrictions governing area, setbacks, frontage, height, bulk or density would unreasonably prevent the owner from using the property for a permitted purpose or would render conformity with such restrictions unnecessarily burdensome. The approval of this request would not be within the purpose and intent of the Ordinance.

OTHER ITEMS REQUIRING BOARD ACTION:

BA07:069 PAUL AND SUSAN BOEMER

Mr. Schmidt *I make a motion to reconsider this matter.*

The motion was seconded by Mr. Day and carried unanimously.

Mr. Schmidt *I make a motion to **approve** the request, in accordance with the Staff's recommendation, as stated in the Staff Memorandum and for the reasons stated in the Staff Memorandum.*

The motion was seconded by Mr. Bartholomew and carried unanimously.

The Planning and Zoning Division staff's recommendation was for **approval** by revising Condition No. 2 to read as follows:

“Prior to the issuance of a Zoning Permit, a Plat of Survey showing the staked-out location of the new detached garage, with the east side of the garage at least 10 ft. from the drainage ditch, the north side of the garage outside of the private road access easement, and the west side of the garage at least 30 ft. from the west lot line. The above-required setbacks and offset shall be measured to the outside edge of the wall, with overhangs not to exceed two (2) ft. in width.”

The reasons for the recommendation, as stated in the Staff Memorandum, are as follows:

The requirement to be located 20' from the private easement serves no purpose, as the easement has no purpose that can be determined by the Board. Both properties on either side of Mr. Boemer's lot are served and have been for many years with very substantial driveways and road access points and the easement ends in the side lot area of the adjacent neighbor to the east and could essentially go no where and would serve no function to that party. Further, it would serve no functionality to any of the neighbors to the west as it goes no where. All of the neighbors are adequately served with very good roads and driveways and the best thing to happen would be that the property owners all agree to abandon the easement, as it serves no purpose. Therefore, it is the Staff's feeling that the 20' required setback from said easement serves no purpose and the imposition of this requirement is excessive. The Staff feels the other requirements imposed by the previous decision; however, relative to the drainage ditch side yard, etc. are all appropriate.

ADJOURNMENT:

Mr. Bartholomew

I make a motion to adjourn this meeting at 10:42 p.m.

The motion was seconded by Mr. Dwyer and carried unanimously.

Respectfully submitted,

Sheri Mount
Secretary, Board of Adjustment